87-1639

No. .....

IN THE

Supreme Court Of The United States

October Term, 1987

THE PERSONNEL BOARD OF
JEFFERSON COUNTY, ALABAMA, *et al.*,
Petitioners,

v.

ROBERT K. WILKS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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March 31, 1988

QUESTIONS PRESENTED FOR REVIEW

1. Whether persons affected by court-approved consent decrees containing race conscious relief can challenge those decrees in a collateral proceeding when they had notice and the opportunity to be heard before the entry of those decrees?

2. Whether a party bound by a court-approved consent decree should be afforded more protection for actions taken thereunder than a party merely acting pursuant to a voluntary affirmative action plan?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs

James A. Bennett
Birmingham Association of City Employees
Charles E. Carlin
Ronnie J. Chambers
Floyd E. Click
Joel A. Day
Lane L. Denard
John E. Garvich, Jr.
James W. Henson
Gerald L. Johnson
Danny R. Laughlin
Robert B. Millsap
James D. Morgan
Gene E. Northington
Carlice E. Payne
Howard E. Pope
Vincent J. Vella
Kenneth O. Ware
Phillip H. Whitley
Marshall G. Whitson
Robert K. Wilks
David H. Woodall

Plaintiff-Intervenor

United States of America

Defendants

Richard Arrington, Jr.
Roderick Beddow, Jr.
City of Birmingham
Joseph W. Curtin
James W. Fields
Patricia Hoban-Moore
Jefferson County Personnel Board
James B. Johnson
Henry P. Johnston
Hiram Y. McKinney

Defendant-Intervenors

John W. Martin
Sam Coar
Major Florence
Charles Howard
Ida McGruder
Eugene Thomas

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Petitioners, James B. Johnson and The Personnel Board of Jefferson County, Alabama, (hereinafter referred to collectively as the "Board") respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on December 15, 1987. Petitioners further request that the Court reverse the decision of the Court of Appeals.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in *In re Birmingham Reverse Discrimination Employment Litigation* is printed at Appendix p. 3a,[1] and is

[1]Pursuant to Rule 30.2, RULES OF THE SUPREME COURT OF THE UNITED STATES, the Board has agreed to submit a Joint Appen-

reported at 833 F.2d 1492 (11th Cir. 1987). The opinion of the United States District Court for the Northern District of Alabama in *In Re Birmingham Reverse Discrimination Employment Litigation* is printed at Appendix p. 27a, and is reported at 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. Dec. 20, 1985).

JURISDICTION

The opinion of the Court of Appeals for the Eleventh Circuit was entered on December 15, 1987 (Appendix at 3a). A timely petition for rehearing en banc was denied on January 25, 1988 (Appendix at 25a), and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth and Fourteenth Amendments to the Constitution of the United States and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. Said provisions are set forth in pertinent part at Appendix p. 1a.

STATEMENT OF THE CASE

The events giving rise to this reverse discrimination litigation began in 1974 and 1975, when a series of lawsuits were commenced against the Board and the City of Birmingham (the "City") by several black males and the Ensley, Alabama branch of the NAACP who filed separate actions alleging that the Board's and City's employment practices unlawfully discriminated against blacks. Thereafter, the Department of Justice filed a separate "pattern and practice" complaint against the

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dix with Petitioners John W. Martin, *et al.*, and Richard Arrington, *et al.* The Joint Appendix has been contemporaneously filed with the petition of John W. Martin, *et al.*

Board and the City, asserting broad charges of race and sex discrimination in employment.

After consolidating the actions, the District Court judge, the Honorable Sam C. Pointer, Jr., conducted a bench trial on the limited issue of the validity of entry level tests for police and firefighters. In an opinion dated January 10, 1977, the District Court concluded that the Board's actions violated Title VII, finding that the tests had an adverse impact upon black applicants. On appeal to the Eleventh Circuit, the District Court's finding of discrimination against the Board was affirmed. *Ensley Branch of NAACP v. Seibels*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980).

A second trial was held in August 1979, during which the validity of certain other tests and screening devices employed by the Board were at issue. After that trial, but prior to a ruling by the District Court, extensive negotiations among the parties culminated in a settlement on terms embodied in proposed consent decrees intended both to address the issues and to govern the future employment practices of the Board and City. Subsequently, the Consent Decree to be entered into by the Board (hereinafter the "Board Decree") was provisionally approved by the District Court.

Since its creation in 1945, the Board has been responsible for recruiting, screening, testing, and certifying applicants for hire and promotion to those jurisdictions (including the City) governed by the Jefferson County, Alabama merit civil service system. As a result of findings of discriminatory practices in this process, the Board Decree contained a carefully constructed affirmative action plan designed to effect the integration of blacks and women into the civil service system. Pursuant to the objectives of the decree, the Board was to act as a conduit to afford the City the reasonable opportunity to meet the goals of the City's Consent Decree by certifying sufficient numbers of qualified blacks and women. Following the entry of the Board Decree, the Board has in good faith attempted to comply with its terms.

In August 1981, the District Court conducted a fairness hearing, considering objections to the decrees and argument and evidence advanced by the proponents thereof. Significantly, the white males who later elected to collaterally attack the consent decrees appeared at this hearing, voicing general objections to approval. Rather than attempting to intervene prior to or at the fairness hearing, these same whites waited until *after* the conclusion of the fairness hearing to move for intervention as parties, notwithstanding their longstanding prior knowledge of the pendency of the claims to be resolved by the decrees and the effect those claims might have upon their substantive rights. Judge Pointer appropriately denied the motion to intervene and granted final approval to the Board Decree and the City Decree.

While Judge Pointer's rulings were on appeal to the Eleventh Circuit, the lawsuits which would comprise this consolidated litigation were filed, alleging that actions taken by the Board pursuant to the Board Decree adversely affected the rights of non-minorities to equal employment opportunities. Appendix p. 110a.

Upon completion of discovery, a trial commenced on December 16, 1985, focusing exclusively upon promotions in the Birmingham Fire and Rescue Service and the City's Engineering Department. Aside from minor references to the Board Decree and the Board's practices and procedures in conjunction therewith, the trial centered upon the City's personnel selection criteria and, specifically, allegations that the City was promoting blacks over demonstrably more qualified whites. At the conclusion of the Plaintiffs' case, the District Court granted the Board's motion to Dismiss pursuant to Rule 41 (b) of the Federal Rules of Civil Procedure, finding that the Plaintiffs had failed to establish any unlawful discrimination by the Board. After the conclusion of the trial, the District Court entered rulings in favor of the remaining Defendants.

The Plaintiffs appealed from the District Court's orders in favor of the City. No appeal, however, was taken from the District Court's decision granting the Board's Motion to Dismiss.

On appeal, the Board argued that the Respondents had failed to properly appeal the dismissal of claims against the Board. The Eleventh Circuit neglected to address this question, observing, without explanation, that the Board was only a "nominal party" to the appeal (833 F.2d at 1497 n.17; Appendix p. 11a). On the substantive issues raised on appeal, the Eleventh Circuit specifically held that nonparties to the City and Board Decrees were not precluded from bringing independent Title VII actions against the City and the Board for actions taken pursuant to the terms of their respective decrees. 833 F.2d at 1498 (Appendix p. 12a, 13a). The panel also instructed the District Court, on remand, to afford the consent decrees no greater weight than a voluntary affirmative action plan in assessing the validity of the Board's and City's defenses to the claims of reverse discrimination asserted against them. 833 F.2d at 1505 (Appendix p. 19a). As will be demonstrated hereunder, this holding is incorrect.

REASONS FOR GRANTING THE WRIT

I. This Case Affords An Opportunity To Address Authoritatively The Issue Presented By *Marino v. Ortiz* And To Resolve The Conflict Of Decisions Among The Courts Of Appeals.

In *Marino v. Ortiz*, ... U.S. ....., 108 S.Ct. 586 (1988) the Court was presented with and considered the identical issue raised herein: "whether a District Court may dismiss as an impermissible collateral attack a lawsuit challenging a consent decree by nonparties to the underlying litigation, . . ." 108 S.Ct. at 587 (1988). This important issue, however, effectively remains open because the Court, as it was then constituted, was equally divided. The addition of a new Justice now makes it possible to resolve this issue definitively by clarifying the existing uncertainty concerning the validity of after-the-fact challenges to consent decrees like those involved here.

The Courts of Appeals of six Circuits have ruled that consent decrees, such as those at issue here, are not subject to col-

lateral attack. *Culbreath v. Dukakis*, 630 F.2d 15, 22-23 (1st Cir. 1980); *Marino v. Ortiz*, 806 F.2d 1144 (2d Cir. 1986), *aff'd*, 108 S. Ct. 586 (1988); *Goins v. Bethlehem Steel Corp.*, 657 F.2d 62 (4th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982); *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982), *cert. denied*, 464 U.S. 900 (1983); *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 558 (6th Cir. 1982), *rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Dennison v. City of Los Angeles Department of Water & Power*, 658 F.2d 694, 696 (9th Cir. 1981).

On the other hand, the Eleventh Circuit, in reaching a contrary conclusion, failed to give appropriate weight to fundamental policy considerations militating against collateral attack on Title VII consent decrees. For example, voluntary compliance with Title VII, including voluntary settlement of disputed Title VII claims, is an essential tool in achieving the ultimate policy goal of eliminating discrimination in employment. The Eleventh Circuit's decision not only discourages voluntary compliance undertaken in conformity with court-approved consent decrees by vastly expanding the number of litigants who can question such compliance, but also substantially increases the threat of endless litigation. Necessarily concomitant with the prospect of duplicative litigation is the risk of imposing inconsistent obligations upon employers. Once collateral attack is permitted, it becomes possible for a judicially approved settlement to be approved for policy reasons and then, under the same facts, to be materially changed, altered or abandoned for conflicting or different policy reasons at a subsequent time. Moreover, as an incident to the uncertainty engendered by the approach which the Eleventh Circuit has now embraced, the integrity of the trial court's role in the consent decree process is undermined, if not as a matter of fact then certainly as a matter of perception among litigants and others affected by the decree. Such results are particularly difficult to justify where, as here, those belatedly asserting a perceived right to undo a court-sanctioned resolution of claims were afforded, but chose to bypass, every reasonable opportunity to

protect their interests from the outset by intervening in litigation.

II. The Decision Below Diminishes The Effectiveness Of The Consent Decree As A Means Of Implementing The Purposes Of Title VII.

The practical consequences of the Eleventh Circuit's conclusion that a consent decree settlement is entitled to no greater weight than a voluntary affirmative action plan are particularly troublesome. As Judge Anderson observed in his dissent below, "[i]t would be anomalous for the City to be liable to the instant plaintiffs for action that the City was required to take on pain of being held in contempt . . ." 833 F.2d at 1502 (Appendix p. 22a).

There are fundamental conceptual and practical differences between consent decrees and voluntary affirmative action plans. First of all, a consent decree is in no realistic sense "voluntary" after it receives court approval. The parties are then bound and, during the pendency of the decree's effect, remain subject to the full array of judicial sanctions available to federal judges in civil cases. In contrast, an employer that violates its own affirmative action plan faces only the prospect of potential litigation. More specifically, an employer found to be in violation of a court-approved decree faces contempt proceedings, while an employer that violates its own voluntary affirmative action plan does not. The remedial purpose of Title VII is, therefore, better served by recognizing the enhanced status and binding effect of a consent decree.

Second, the context in which an affirmative action plan is developed clothes it with much less inherent authority or respect than that which imbues a court-approved decree. For the most part, affirmative action plans are developed in private, non-adversarial environments while consent decree settlements are usually the result of difficult multi-party negotiations in contested litigation. Moreover, because the decree is approved and, to some extent, overseen by a federal judge, rather than a

corporate or public officer, it is presumably entitled to a greater degree of credibility and reliance than even the best laid affirmative action plan. Further, the decree is a method of cutting short litigation, while the voluntary plan is a means of preventing it in the first instance.

As the Eleventh Circuit acknowledged, less than one page after it refused to afford the consent decree in this case any more deference than that given to a voluntary program, the district court retains jurisdiction over the case in which it has entered a consent decree. 833 F.2d at 1501 (Appendix p. 20a). Therefore, the plan embodied in the decree is supervised on an ongoing basis to assure its proper implementation. To reiterate, the employer faces a contempt citation for violations of the decree, which, in and of itself, makes compliance completely different from compliance with a voluntary plan.

The concept of a consent decree was addressed in *Local No. 93, Intern. Ass'n of Firefighters v. City of Cleveland,* 478 U.S. 501, 106 S.Ct. 3063 (1986). While recognizing the voluntary nature of these decrees, the Court in *Local No. 93* evaluated the "dual character" of a consent decree, by observing whether the decree is to be treated as a contract, or as a judgment, depends upon the context. 106 S.Ct. at 3074. In the context presented by this case – where nonparties to the decree seek to attack action taken in observance of the decree as a violation of Title VII – the factors recognized in *Local No. 93* as indicative of the judgment aspect of a consent decree are important. For example, under *Local No. 93* "a consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction" and must "come within the general scope of the case made by the pleadings". 106 S.Ct. at 3077 (citation omitted). The court retains the power to modify the decree, even over the objection of a litigant; this power may remain unused, or may be exercised to supervise the parties and interpret the decree over a period of years after the decree is entered. *See* 106 S.Ct. 3076 & nn. 12, 13. This continuing jurisdiction affords the court a greater degree of flexibility in enforcing the decree than it would have in a case where a judgment is entered after trial. 106 S.Ct. at 3076 n. 13. Simply stated, a federal court does not act merely as a "recorder of contracts". 106 S.Ct. at 3077. Rather, it lends the authority of the federal courts to the provisions of the decree; its "power to modify the consent decree is the same as [its] power to modify a litigated decree, . . ." 106 S.Ct. at 3078. Accordingly, the inherently judgmental nature of a consent decree entitles it to more deference than a voluntary affirmative action plan.

Further, because the Eleventh Circuit's holding leaves open the possibility that the Board may be held liable for actions that it took in reliance on the consent decree, it directly contradicts both the letter and the spirit of Section 713(b) of Title VII, 42 U.S.C. § 2000e-12(b). This statute provides that an employer shall not be subject to liability for acting in conformity with, and in reliance on, a written interpretation of the Equal Employment Opportunity Commission ("EEOC"). The *Affirmative Action Guidelines,* promulgated by the EEOC pursuant to Title VII, provide that a party is entitled to rely upon an order of a court of competent jurisdiction, whether that order is entered by consent or after contested litigation. 29 C.F.R. § 1608.8. Accordingly, a party to a consent decree is entitled to rely upon compliance therewith to a much greater extent than mere voluntary compliance with an affirmative action plan.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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